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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 APR 19 PM 4:21

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300CR20081339

Div. 6

**MOTION TO DISMISS THE
SOLE REMAINING
AGGRAVATOR: PECUNIARY
GAIN**

(Oral Argument Requested)

Steven DeMocker, by and through counsel, hereby requests that this Court dismiss the sole remaining aggravator in this case—pecuniary gain, the (f)(5) claim. Granting this motion will eliminate the death penalty sentence from this case. This is as it should be, for the reasons set forth in the following Memorandum.

MEMORANDUM OF POINTS AND AUTHORITIES

Can a death sentence rest in this case on a jury finding that the homicide was committed “as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value”? If this is the sole aggravating factor presented to the jury, can a sentence of death be seen as anything other than constitutionally

1 “unusual”? Or, would this hypothetical death sentence, instead, suit better the
2 definition of the “bolt of lightning” or the totally arbitrary result feared by Justices
3 Stewart and White when they voted to hold the death penalty unconstitutional as
4 administered in this country 38 years ago? *Furman v. Georgia*, 408 U.S. 238 (1972).

5 Some measure of the uniqueness of this circumstance can be gleaned from the
6 available data on Arizona’s death row population. There are 130 people on death row
7 in this State as of the most recent count. Of those, five are cases in which “pecuniary
8 gain” stands as the sole aggravating justification.¹ These five cases represent less than
9 5 % of Arizona’s death row population. That alone might be cause for concern, but
10 even a cursory look at those five cases confirms what one might expect: every one of
11 those cases involve situations in which financial gain could be understood by the trier
12 of fact to have been the central purpose of the homicide. Two of the five cases—
13 Roseberry, and White—are cases from Yavapai County. In each case, if one accepted
14 the prosecution’s proof as true, there would be no doubt that the killing was done “in
15 expectation of the receipt of” financial gain. The same is true of the other three.

16 This is the sum total of Arizona capital cases. There are no other cases we
17 could find in this State’s history in which a death sentence was premised and upheld
18 when this aggravator was the only one alleged and found at trial. There are a small
19 number of other cases that have been reversed on appeal or on habeas corpus.² Not a
20 single one of these cases, however, can be said to be in any way similar to the facts
21 alleged here. If Steve DeMocker were convicted and sentenced to death with
22 pecuniary gain as the justification, and if that sentence were to be upheld, it would be
23 a first in Arizona history.

24
25 ¹ The five cases are as follows: (1) Vincent Accardo (direct appeal pending to the Arizona Supreme Court);
26 (2) James Harrod (*State v. Harrod*, 218 Ariz. 268 (2008)); (3) Homer Roseberry (*State v. Roseberry*, 210 Ariz.
27 360 (2005)); (4) Anthony Spears (*State v. Spears*, 184 Ariz. 277 (1996)); and (5) Michael White (*State v. White*,
194 Ariz. 344 (1999)).

28 ² *State v. Rutledge*, 206 Ariz. 172 (2003); *Hedlund v. Ryan*, No. CV 02-110-PHX-DGC, 2009 WL 2432739
(Aug. 10, 2009); *State v. Prince*, 160 Ariz. 268 (1989); *State v. Stevens*, 764 P.2d 724 (1988).

1 Part of the reason for the uniqueness of this case can be found in the efforts of
2 our courts to define the (f)(5) aggravator in ways that limit its use by channeling the
3 discretion of the trier of fact. Thus, pecuniary gain must be the “but for” cause of the
4 homicide. *See e.g., Rutledge*, 206 Ariz. at 175. Pecuniary gain must be proved to be
5 a “motive, cause, or impetus” for murder, and gain cannot simply be the result of the
6 murder. *State v. Harrod*, 218 Ariz. 266, 282, 183 P.3d 529, 533 (2008). To satisfy
7 that criterion in this case, the jury will have to find beyond a reasonable doubt that
8 Steve DeMocker killed Carol Kennedy to eliminate alimony payments. While that
9 may well be an effect, there is no proof that this was the motive for her death. We
10 submit that even if a jury were to become somehow persuaded that this aggravator
11 applies, no prosecutor, judge or appellate court would be able to maintain seriously
12 that this case should become the first in Arizona history where death is to be based on
13 so narrow a foundation.

14 To ask the question whether Steve DeMocker is among the “worst of the
15 worst,” is to answer it. The question might be better asked with an eye to the sad
16 reality of domestic violence in Arizona and the United States. Is there any honorable
17 way to distinguish this homicide from the countless scores of deaths that arise from
18 violent disputes between spouses and former spouses? Is the pecuniary gain alleged
19 here in any way more worthy of the punishment of death than any other?

20 Pecuniary gain is charged often. As we noted in our motion on the
21 Unconstitutionality of the Death Penalty (filed February 16, 2010), this aggravator has
22 been charged in 38 % of the Yavapai County death penalty cases in the post-*Ring* era.
23 (See page 50.) What has not happened in this County or in this State is the situation
24 where “pecuniary gain” is the sole remaining justification for seeking death in a case
25 resting on proof born of inferences and argument without direct evidence. This has
26 long ago ceased being a case based on allegations of cold and calculating killing.
27 Each of the other aggravators is gone too. It is only an accident of the timing of
28

1 rulings in this case that today the prosecution has nothing left to support the death
2 penalty but this single aggravator. We think it is a safe understatement to observe that
3 if this were the only available aggravator at the commencement of this case, it would
4 never have been charged as a capital case and if it were, no properly instructed grand
5 jury would have returned an indictment with this as the appropriate available penalty.

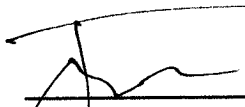
6 We also cannot help but wonder what this unintended single-aggravator
7 situation says about governmental respect for the views of those described as
8 "victims." We cannot ask Ruth Kennedy, but were the State to review with her fully
9 and honestly the developments of the last few months, we think it likely that she
10 would not support the prosecution's pursuit of death. If she knew that four of the
11 alleged aggravating circumstances had been eliminated and that the sole remaining
12 accusation is that Steve DeMocker killed his former wife for money, we doubt that
13 she would be counted as a believer in the State's case. We know to a certainty that
14 two of the most immediately affected victims of Carol Kennedy's death—her two
15 daughters—recoil at the notion that this was a homicide in which the object was
16 financial benefit.

17 When the death penalty was reinstituted as a lawful punishment in the years
18 after *Furman v. Georgia*, the Supreme Court emphasized in case after case that a
19 state's sentencing scheme "must channel the sentencer's discretion by clear and
20 objective standards that provide specific and detailed guidance." *Godfrey v. Georgia*,
21 446 U.S. 420, 428 (1980). If one posits for just a moment the notion that a death
22 sentence might be rendered in this case, it becomes necessary to ask how this case can
23 be distinguished from countless others. If that question cannot be answered without
24 reliance on the hope that the next jury will follow instructions better than this one—
25 and better than the jurors surveyed by the capital jury project—what we will be forced
26 honestly to admit is that the system we have is arbitrary in its consequences. Stated in
27 the terms expressed by the Supreme Court, if "specific and detailed guidance" to this
28

1 jury results in death, must it not also mandate death in every other domestic
2 homicide?

3
4 DATED this 19th day of April, 2010.

5 By:


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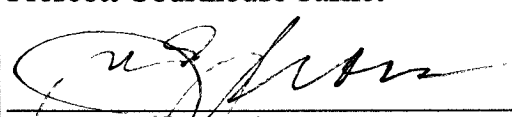
15 **ORIGINAL** of the foregoing hand delivered for
16 filing this 19th day of April, 2010, with:

17 Jeanne Hicks
18 Clerk of the Court
19 Yavapai County Superior Court
20 120 S. Cortez
21 Prescott, AZ 86303

22 **COPIES** of the foregoing hand delivered this
23 this 19th day of April, 2010, to:

24 The Hon. Thomas B. Lindberg
25 Judge of the Superior Court
26 Division Six
27 120 S. Cortez
28 Prescott, AZ 86303

Joseph C. Butner, Esq.
Prescott Courthouse basket


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